

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Complaint of AT&T Communications of New England,
Inc. and Covad Communications Company, pursuant to
220 C.M.R. § 1.04, regarding collocation power charges
assessed by Verizon New England, Inc. d/b/a Verizon
Massachusetts

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D.T.E. 01-39

**JOINT REBUTTAL TESTIMONY OF VALERIE EVANS AND
JOHN FOGARTY ON BEHALF OF COVAD
COMMUNICATIONS COMPANY**

Introduction

- 1. ARE YOU THE SAME VALERIE EVANS AND JOHN FOGARTY
WHO SUBMITTED JOINT DIRECT TESTIMONY IN THIS CASE
ON NOVEMBER 13, 2001?**
2. Yes, we are. Our business addresses and background information are stated in
that direct testimony.
- 3. WHAT IS THE PURPOSE OF YOUR JOINT REBUTTAL
TESTIMONY?**
4. We respond below to various points raised in the Direct Testimony of Bruce
Lear and Lynelle Reney on behalf of Verizon New England, Inc. d/b/a
Verizon Massachusetts ("Verizon Direct").

Overarching Points

5. WHAT STRUCK YOU MOST ABOUT VERIZON'S DIRECT TESTIMONY?

- 6.** Verizon utterly failed to defend one of its major arguments, and it only weakly defended another.

7. WHAT ARGUMENT DID VERIZON FAIL TO DEFEND?

- 8.** Verizon simply refused to address directly counter arguments to its previous contention that Covad misordered collocation power.

9. COULD YOU BRIEFLY PARAPHRASE VERIZON'S ARGUMENT?

- 10.** Yes. In its Answer in this case (at ¶ 9), Verizon argued that Covad may have misordered DC power in the first place. As we noted in our earlier testimony, Verizon has fleshed this argument out in other states, claiming that if Covad had wanted to load share, it should have ordered half of its total load on each sub-feed. For example, if Covad wanted 40 total amps to be load shared between two sub-feeds, Verizon contends that Covad should have ordered 20 amps on each sub-feed.

11. WHAT WAS THE LOGICAL PROBLEM THAT YOU IDENTIFIED WITH VERIZON'S ARGUMENT?

- 12.** Because, during the relevant period of time, Verizon fused each sub-feed at 150% of the load, it would not have been possible to load share. Had Covad ordered 20 amps on each sub-feed, with the intention of drawing 40 total amps, Verizon would have fused each sub-feed at 30 amps. If one of the sub-feeds failed, the other sub-feed could not have handled the total 40 amp load

without blowing its 30 amp fuse. Consequently, Verizon makes no sense when it argues that Covad should have ordered half of its total load on each sub-feed. Tellingly, Verizon does not even attempt to defend its illogical argument in its direct testimony.

- 13. ALTHOUGH VERIZON DOES NOT MAKE ANY EFFORT TO DEFEND ITS CHARGE THAT COVAD MISORDERED DC POWER, IT STATES (AT [INSERT]) THAT “THE AMOUNT OF POWER ACTUALLY USED CAN BE UP TO THE TOTAL CAPACITY THAT VERIZON MA PROVISIONED.” DO YOU AGREE?**
14. No, because using all of the power that two sub-feeds theoretically could provide would eliminate the redundant feature of the power configuration. Verizon’s statement is a variation on its argument that Covad misordered DC power and falls for the same reasons as are stated above.
- 15. WHAT WAS THE SECOND ARGUMENT THAT, AS YOU STATED ABOVE, VERIZON DEFENDED WEAKLY?**
16. Verizon has argued that its relevant tariffs permitted it to charge for DC power based upon the size of the fuse on each sub-feed and the number of sub-feeds, which results in tripling the charges. Verizon premised its argument upon certain language of D.T.E. Tariff No. 17 (“Tariff 17”). *See* Verizon Answer, at 1-2 (arguing that Tariff 17’s language assessed the DC power rate “per fused amp provisioned to the CLEC collocation arrangement

on a per amp, per feed basis”). While not agreeing that the language of Tariff 17 permitted the triple charging, Covad responded that the absence of that language in D.T.E. Tariff No. 15 (“Tariff 15”) at least must mean that triple charging was not permitted under that tariff.

17. WHAT WAS VERIZON’S RESPONSE TO COVAD’S ARGUMENT?

18. We quote below Verizon’s entire response:

Verizon’s DPU 15 tariff clearly states that charges for DC power are incurred on a per amp basis. Covad was provided with DC power for the total amount fused on each feed and was billed properly for each amp which it could draw.

Verizon Direct, at 20.

19. WHAT IS YOUR REACTION?

20. First, Verizon plainly refuses to explain why the presence of certain language in Tariff 17 gave it the right to use the charging scheme that it did, while the absence of that language in Tariff 15 had no effect on the legality of its actions.

21. Second, we should note that, while Verizon modified Tariff 17 to eliminate charging for DC power based upon fuse size, it did not modify Tariff 15 in any respect. Yet, in the 271 case, Verizon told the FCC that Covad would not be charged for DC power based upon fuse size.¹ For that statement to have been true, Verizon must have interpreted the Tariff 15 language not to require

¹ See *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., For Authorization To Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order, CC Docket No. 01-9, FCC 01-130, at ¶ 200 (rel. April 16, 2001).

(and therefore not permit) such fused-based charging. The Department should not allow Verizon to run from that position now.

22. Third, we cannot believe that any unbiased person would interpret the words “Per amp” in Tariff 15 to mean that Verizon can charge Covad for whatever number of amps it *provides -- without regard to the number of amps that Covad actually orders*. For the language of Tariff 15 to have any logical basis, it must mean that Verizon has the right to charge Covad only for the number of amps that Covad orders. In most cases, that number was 40, not 120 (as Verizon charged Covad).
23. If the Department believes that the tariff language could be interpreted either way, it should find, at the very least, that the language is ambiguous and should be construed against the drafter (Verizon).
- 24. WHAT IS YOUR REACTION TO VERIZON’S CLAIM (AT PAGE 17 OF ITS DIRECT TESTIMONY) THAT “THE TARIFFS CHARGED FOR THE FUSED AMPS ON EACH FEED IN ACCORDANCE WITH THE SPECIFIED LOAD WHICH THE CLEC REQUESTED ON EACH FEED”?**
25. Given our discussion of this issue above, we find it hard to believe that Verizon is referring to Tariff 15, which did not reference “fused amps” in any way.

Responses to Verizon’s Arguments

26. ON PAGES 5 - 7 OF ITS DIRECT TESTIMONY, VERIZON CLAIMS THAT ITS CLEC HANDBOOK AND TESTIMONY IN D.T.E. 98-57 AND D.T.E. 99-271 PUT CLECS ON NOTICE AS TO HOW VERIZON ASSESSES DC POWER CHARGES. DOES THIS MATTER?

27. No. Although we are not attorneys, our understanding is that, under the filed rate doctrine, Verizon's right to assess a charge depends solely upon the content of its filed tariff. If Verizon cannot show that its tariff supports a particular charge, it must refund any monies collected for the charge.

28. DOES VERIZON CONTRADICT ITSELF ON THIS ISSUE?

29. Yes. On page 13 of its direct testimony, Verizon, in arguing that CLECs cannot refer to collocation applications to explain the billing for DC power, states that "CLECs should refer to the tariffs and their Interconnection Agreements² for information on the uses of collocation *and billing*" (Emphasis added). We wholeheartedly agree and merely wish to point out that Verizon's earlier discussion of the CLEC Handbook and testimony given in various Department proceedings cannot trump the plain language of the tariffs.

30. VERIZON ASSERTS (ON PAGE 7 OF ITS DIRECT TESTIMONY) THAT AN ADMINISTRATIVE LAW JUDGE IN PENNSYLVANIA HAS "FOUND THAT VERIZON PENNSYLVANIA'S TARIFF PROVIDED FOR CHARGING CLECS ON THE BASIS OF FUSED

AMPS AND THAT THE BASIS WAS CHANGED TO LOAD AMPS THROUGH A SETTLEMENT.” WHAT IS YOUR RESPONSE?

- 31.** Although we are not attorneys, it more than apparent to us that the tariff language in Pennsylvania was dramatically different than the language of Tariff 15 in Massachusetts. It is probably not a coincidence that Verizon glosses over this issue and does not even attempt to show that the two tariffs are similar. In addition, we note that the Pennsylvania decision comes from an ALJ, which means that it is still subject to Commission review.
- 32. ON PAGE 11 OF ITS DIRECT TESTIMONY, VERIZON STATES THAT “THE COLLOCATION APPLICATION ASKS CLECS TO PROVIDE THE NUMBER OF ‘LOAD’ OR ‘DRAIN’ AMPS REQUIRED *PER FEED*, NOT PER ‘FEED PAIR,’ IN ORDER FOR VERIZON TO PROPERLY CONSTRUCT AND FUSE THE FEEDS.” (EMPHASIS IN ORIGINAL). IS THIS TRUE?**
- 33.** No.
- 34. BEFORE YOU EXPLAIN WHY, WHAT IS THE SIGNIFICANCE OF VERIZON’S STATEMENT?**
35. Verizon is arguing that (1) CLECs have the ability to specify the amount power to be delivered over each sub-feed; and (2) therefore they should spread their total intended power over the two sub-feeds, as opposed to configuring each sub-feed to handle the total intended power draw. This

² In Covad’s case, its interconnection agreement with Verizon defers to applicable tariffs for

argument is a variation on its claim that CLECs misordered DC power, which we dealt with above in paragraphs 7 - 14.

36. WHY WAS VERIZON'S STATEMENT WRONG?

37. Verizon said that its collocation application does not ask for the amount of power that a CLECs requires "per 'feed pair.'" However, the text of the applications belies Verizon's claim. The collocation application attached to our previous testimony (at Exhibit D), which is representative of all applications Covad submitted to Verizon in Massachusetts, shows that it is simply not possible to order power by sub-feed. Under the plain language of the collocation application, which defines each "feed" as a pair of sub-feeds,³ collocators have no choice but to order the amount of power that they intend to use over both the "A" and "B" sub-feeds.

38. IN THE SAME PARAGRAPH IN WHICH VERIZON'S INCORRECT STATEMENT APPEARS, VERIZON ALSO ARGUES THAT THE WORDS "DO NOT ADD TOGETHER" IN THE COLLOCATION APPLICATIONS "WAS NOT INTENDED TO DIRECT CLECS ON HOW TO ENGINEER, USE, OR DRAW DC POWER." DO YOU AGREE?

39. No.

the pricing for DC power (among other rate elements).

³ The applications stated that "quantity of '1' [feed] equals one A&B Feed Pair." See Exhibit D to Covad's direct testimony.

40. WHAT IS THE SIGNIFICANCE OF THIS SECOND STATEMENT?

41. Verizon attempts to refute Covad's argument that the words "DO NOT ADD TOGETHER," which refer to amounts of power to be provisioned on the A and B sub-feeds, prohibit CLECs from ordering, for example, 30 amps on the application, when they intend to use 60 amps. This argument is a restatement of Verizon's position that Covad misordered power (by allegedly failing to put half of its power drain on each sub-feed), which we refuted above in paragraphs 7 - 14.

42. CAN YOU ALSO EXPLAIN WHY YOU DO NOT AGREE THAT THE WORDS "DO NOT ADD TOGETHER" DO NOT INSTRUCT CLECS HOW TO USE DC POWER?

43. Yes. First of all, one of us (John Fogarty) helped write the applications in which those words appear and therefore can say that they were intended to prevent CLECs from doubling their power draw by using the maximum drain on each sub-feed.

44. Second, the words "DO NOT EXCEED MAXIMUMS STATED ABOVE," which appear immediately after the words "DO NOT ADD TOGETHER" in the application, are not merely intended to instruct CLECs how to order DC power. Rather, those words clearly tell CLECs how to "engineer, use, or draw DC power" (*i.e.*, CLECs must not engineer, use or draw more power than the maximum amperage ratings stated on the application). Accordingly,

Verizon's assertion that the words "DO NOT ADD TOGETHER" simply are instructions for ordering DC power also does not comport with the context in which those words appear.

45. VERIZON CLAIMS (AT PAGES 15-16 OF ITS DIRECT TESTIMONY) TO HAVE AUDITED COVAD AND FOUND IT TO BE DRAWING THE FULL DRAINED AMOUNT OF POWER ON EACH SUB-FEED "AT CERTAIN COLLOCATION ARRANGEMENTS." WHAT IS YOUR REACTION?

46. We saw this allegation in response to Covad's power complaint against Verizon in New York. When we researched the issue, we discovered that Covad was inadvertently overdrawing power at a few central offices. It turned out that Covad had requested power augments at these locations and Verizon had provided them, but Covad had not completed the task of connecting its equipment to the new power sub-feeds and was accidentally drawing more power over the existing sub-feeds. However, Verizon was not damaged in any respect because it billed Covad for the recurring charges associated with the power augments, even though Covad was not using them. If anything, Covad's mistake hurt only itself because, by drawing the maximum requested load on each sub-feed, it could not take advantage of having redundant sub-feeds. Had one of the sub-feeds failed, the other one would not have been able to support twice the maximum requested load, and Covad's network would have gone down.

47. It is important to emphasize that the instances in which Covad overdrew DC power were aberrational and completely accidental. Tellingly, Verizon does not assert that it has any reason to believe that these instances were intentional or in any way common.

48. ON PAGE 16 OF ITS DIRECT TESTIMONY, VERIZON STATES THAT COVAD HAS TOLD BOTH THE FCC AND THE NEW YORK COMMISSION THAT “ONE OF THE FEEDS SERVED ONLY AS A BACKUP FEED.” CAN YOU COMMENT ON VERIZON’S CLAIM?

49. Yes. Counsel for Covad mistakenly made the statements that Verizon describes. We regret any confusion that that mistake may have caused, but respectfully submit that correcting the misstatements does not alter merits of this (or any other) case.

50. ON PAGES 18 – 20 OF ITS DIRECT TESTIMONY, VERIZON STATES THAT THE DEPARTMENT’S RULING IN THE PHASE 4-G ORDER OF THE *CONSOLIDATED ARBITRATIONS* SUPPORTS ITS CHARGING SCHEME. WHAT IS YOUR RESPONSE?

51. Although we are not lawyers, we believe that the proceeding Verizon cites related to Tariff 17, not Tariff 15, under which Verizon provisioned the vast majority of Covad’s collocation arrangements. Therefore, Verizon’s argument is mostly inapplicable to Covad.

52. Moreover, it is irrelevant what the Department authorized Verizon to charge in the Phase 4-G Order, if the text of Tariff 17 does not unambiguously reflect those rulings. As we have argued in previous testimony, the text of that tariff is ambiguous.
53. **ON PAGE 21 OF ITS DIRECT TESTIMONY, VERIZON ASSERTS THAT COVAD'S ESTIMATE OF ALLEGED OVERCHARGES IS INCORRECT. WHAT IS YOUR RESPONSE?**
54. The disagreement here does not concern Covad's *method* for calculating the alleged overcharge. Rather, Verizon disagrees with the fundamental premise that it overcharged Covad in the first place and merely rehashes its substantive position that it was entitled to triple charge Covad for DC power. If the Department finds Verizon to have engaged in overcharging, nothing in Verizon's testimony contradicts Covad's method of calculating that overcharge.
55. **VERIZON CONTENDS (AT PAGES 3, 21 - 22 OF ITS DIRECT TESTIMONY) THAT IT HAD THE LEGAL RIGHT TO APPLY DC POWER CHARGES (AS WELL AS OTHER COLLOCATION CHARGES) TO ELEVEN CENTRAL OFFICES IN MASSACHUSETTS THAT COVAD ALLEGES NOT TO HAVE ACCEPTED. DO YOU AGREE?**
56. No. Verizon itself states the standard under which it may begin assessing collocation charges to CLECs for new collocation arrangements:

Under Verizon MA's tariffs, Verizon MA properly billed its recurring charges for a collocation arrangement, including charges for DC power, upon occupancy or 30 days following written notice of Verizon MA's completion of the collocation arrangement.

Verizon Direct, at 3. As Verizon admits, Covad did not occupy the eleven central offices at issue. So, Verizon's right to charge Covad depends upon whether Verizon notified Covad that the collocation arrangements were completed. Verizon does not allege in its testimony that it provided such notice to Covad. More importantly, we requested several months ago that Verizon provide copies of such notices (if they do indeed exist) and it has so far failed to comply. We thus believe that Covad did not receive any such notice, and, in any event, the record of this case does not support Verizon's right to charge Covad for the eleven central offices.

**57. DOES THIS CONCLUDE YOUR JOINT REBUTTAL
TESTIMONY?**

58. Yes, it does.